VOLUME 58

UNITED STATES OF AMERICA (58 I.A.2 47)

State of Illinois )
Appellate Court ) ss:
Second District )

At a session of the Appellate Court, begun and held at Ottawa, on the 1st day of January, in the year of our Lord one thousand nine hundred and sixty-four, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable WILLIAM M. CARROLL, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk Pro Tempore
JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APRIL 23, 1965 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Abstract

NO. 64-16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT



| | | |
|---|---|---|
| JAMES JUDD, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | Appeal from the |
| vs. | ) | Circuit Court of |
| | ) | Kane County. |
| ILLINOIS CENTRAL RAILROAD, | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

MR. JUSTICE MORAN delivered the opinion of the court:

This is a personal injury action brought by the plaintiff against his employer, the Illinois Central Railroad, under the Federal Employer's Liability Act. The defendant filed a motion for summary judgment, setting up the fact that the plaintiff had executed a full release of his personal injury claim for the sum of $500. The motion was supported by the affidavit of the defendant's claim agent who obtained plaintiff's signature to the release, the affidavit of one of plaintiff's neighbors to the effect that she was present when the release was executed and heard it read and explained to the plaintiff, portions of the transcript of plaintiff's discovery deposition wherein he admitted execution of the release, and by a copy of

the release itself.

The affidavits attached to defendant's motion clearly alleged facts which support the proposition that plaintiff understood that he was settling his personal injury claim when he executed the release. The language of the release itself is plain and unambiguous.

In opposition to defendant's motion for summary judgment, plaintiff filed his own affidavit, the relevant portions of which were as follows:

> "***4. That approximately one week prior to December 14, 1960, D. R. Groves, an employee of the Illinois Central Railroad, came to my place of residence, at that time in Rutland, Illinois, and informed me that I had approximately $500.00 back pay coming to me from the Illinois Central Railraod, as the result of my employment there.
>
> 5. That on or about December 14, 1960, the said D. R. Groves came to place of residence and tendered to me a check in the amount of $500.00 and said 'This is what you had coming.'
>
> 6. That on the last mentioned date, the said D. R. Groves at no time read the Release to me.
>
> 7. That I am unable to read or write.
>
> 8. That I signed and wrote upon the Release in the form requested of me and with the assistance of the said D. R. Groves.
>
> 9. That I did not understand that the paper which I signed was a Release. ***"

The trial court granted defendant's motion for summary judgment, and this appeal follows. The sole issue for us to decide is whether there is any genuine issue of material fact remaining in the case when the affidavits and exhibits attached to defendant's motion and the counter-affidavit of plaintiff are considered. Simaitis v Thrash, 25 Ill. App. 2d 340, 346 (2d dist. 1960).

One who attacks the validity of a release of a claim under the Federal Employers Liability Act has the burden of proving ". . . that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Callen v Pennsylvania R. Co., 332 U.S. 625, 68 S. Ct. 296, 298 (1948). There is no question of mutual mistake in this case, and we therefore confine ourselves to a consideration of whether plaintiff's counter-affidavit raises a genuine issue as to the existence of fraud.

We are required to give a liberal construction to plaintiff's counter-affidavit. Solone v Reck, 32 Ill. App. 2d 308, 311 (1st dist. 1961). Considered in this light, the counter-affidavit alleges that about one week prior to the execution of the release, the railroad claim agent told plaintiff he had approximately $500.00 back pay coming, and that, on the occasion when the release was executed, this same claim agent merely said, "This is what you had coming." Plaintiff is illiterate, and could not read the release. (Plaintiff's discovery deposition indicates that he is able to sign his name but is otherwise illiterate). He signed the release with the assistance of the claim agent, not understanding that it was a release and assuming, apparently, that it was some document necessary to sign in connection with receiving his back pay.

The alleged statement of the claim agent that "This is what you had coming" is clearly more consistent with some liquidated amount, such as back pay, then it is with an unliquidated claim for personal injuries. The material submitted by the parties in connection with the motion for summary judgment does not indicate the nature or extent of plaintiff's injuries, but plaintiff did state in his discovery deposition, the transcript of which is attached to the defendant's motion, that he had asked $3,000

of the defendant to settle his claim. There is no allegation that the sum of $500.00 had ever been discussed as a settlement figure prior to the date the release was executed.

We think that under the circumstances alleged in plaintiff's counter-affidavit there is a genuine issue of fact as to whether plaintiff was induced to sign the release by fraudulent conduct on the part of defendant. Considering only the facts alleged in the counter-affidavit, and assuming them to be true, plaintiff was told that he had about $500.00 back pay coming, and then was handed a check for $500.00 with the statement "This is what you had coming." It is true that a week intervened between the two statements, but, since no events material to this controversy are alleged to have occurred during that week, we regard the time interval as unimportant. The combination of the two statements allegedly made by the railroad claim agent could reasonably be found to amount to a representation that the $500.00 given to the plaintiff was for back pay. We think, therefore, that the case is directly controlled by Dice v Akron, Canton & Youngstown R. Co., 342 U. S. 359, 72 S. Ct. 312, 314-315 (1952). In that case, the jury had returned a verdict in favor of the injured employee in a suit brought under the Federal Employers Liability Act. The railroad had interposed the defense of a release, but the evidence of the plaintiff was that he had signed the release "relying on the respondent's deliberately false statement that the document was nothing more than a mere receipt for back wages." After the verdict, the trial court entered a judgment for defendant notwithstanding the verdict, on the basis that the plaintiff had been "guilty of supine negligence" in failing to read the release. The case was appealed through the Ohio courts, and finally came before the Supreme Court of the United States, which held that the jury verdict should have been allowed to stand:

> "In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. And this Ohio rule is out of harmony with modern judicial and legislative practice to relieve injured persons from the effect of releases fraudulently obtained. * * * We hold that the correct federal rule is that announced by the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court -- a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release. The trial court's charge to the jury correctly stated this rule of law."
> (72 S. Ct. 312, 314-315)

In the Dice case, the employee was able to read the release but failed to do so in reliance upon the employer's representations. In the instant case, it appears that plaintiff could not have read the release had he wanted to.

There are other cases which we think are in point. In Pioneer Cooperage Co. v Romanowicz, 186 Ill. 9, 14-15 (1900), the evidence indicated that the plaintiff, who could not read English, signed a release on the representation that it was a document authorizing the defendant to furnish a physician. The defendant had requested an instruction to the effect that any deception practiced upon the plaintiff could not be relied upon to set aside the release, since the deception was the result of plaintiff's own negligence. The court held that this instruction was properly refused, and cited with approval the holding in National Syrup Co. v Carlson, 47 Ill. App. 178, that ". . . a release may be regarded as not fairly obtained, and hence as inoperative, where it is taken from one unable to read the language and is not read over to him, and he is made to believe that it is a paper for some other purpose." (186 Ill. at 15). In C.R.I. & P. Ry. Co. v Lewis, 109 Ill. 120, 129-130 (1884), the court approved a jury instruction to

the effect that ". . . if the release was obtained from plaintiff by representations or acts of defendants agents which induced in her mind the belief it was only a receipt for money paid her at the time as compensation to her for loss of time and expenses incident to the delay that had resulted from the accident, and not as a discharge of defendant from any claim she might have against the company for injuries sustained, or if it was obtained by fraud and circumvention on the part of the agents of defendant, the writing would be void as to her." The court remarked that ". . . certainly if she was induced to sign it under the belief, created by defendant's agents, she was simply signing a receipt for expenses, defendant would not be permitted to plead it as a defense to the action. That would be to have an advantage from its own wrong, which the law will not tolerate." In Ill. Cent. R. R. Co. v Welch, 52 Ill. 183, 187 (1869) the trial court had instructed the jury as a matter of law that the purported release executed by the plaintiff was invalid. The Supreme Court reversed, holding the matter of the validity of the release to be a proper question for the jury:

> "It cannot be denied that this release is, in its terms, sufficiently broad to cover the present action. If, however, the appellee was induced to sign it by representations that it covered merely his claim for a month's time, or a month's wages, or if he signed it under such a belief, induced by the words or acts of the agents of the appellant, then, of course, the release would not be a bar to the prosecution of this suit. This question should have been left to a jury."

See also Reitz v Yellow Cab Co., 248 Ill. App. 287, 292-293 (1st dist. 1928); I., D. & W. Ry. Co. v Fowler, 103 Ill. App. 565, 575 (4th dist. 1902), aff'd 201 Ill. 152; Nat. Syrup Co. v Carlson, 47 Ill. App. 178, 182 (2d dist. 1892), aff'd 155 Ill. 210; Brown v Pennsylvania R. Co., 158 F. 2d 795, 796 (2d Cir. 1947).

On the basis of the foregoing authorities, we believe that defendant's motion for summary judgment was improperly granted in this case. Accordingly, the case will be reversed and remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

Abrahamson, P. J. and Carroll, J. concur

United States of America

State of Illinois,
Appellate Court,
Second District,
} ss.

*I,* Howard K. Kellett, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.*

In Testimony Whereof, *I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this* 27th *day of* July *A. D. 196*7

Howard K Kellett

*Clerk Appellate Court,*
*Second Judicial District*

NO. 64-68

58 I.A.2 78

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

| | | |
|---|---|---|
| VIRGINIA MAE VACHATA, Plaintiff-Appellee, vs. ELMER CHARLES VACHATA, Defendant-Appellant. | ) | Appeal from the Circuit Court of Jackson County. |

Goldenhersh, J.

On February 26, 1964, plaintiff filed a complaint in the Circuit Court of Jackson County seeking to annul her marriage to defendant. She alleges that a pretended marriage was solemnized on October 1, 1962, that at that time defendant was under indictment for the crime of forgery, that he concealed that fact from her, that on October 17, 1962, he pleaded guilty to the offense charged and was sentenced to the penitentiary, that no children were born of the marriage, and that since learning of the fraudulent concealment of the criminal charge she has not cohabited with defendant.

Defendant answered pro se, admitting the marriage, ~~and~~ denying the remaining allegations of the complaint, and affirmatively alleging matters not material to the issues.

The case was set for hearing on several occasions and continued at the request of an attorney with whom defendant had corresponded, requesting that he represent him in the matter. Several petitions and motions, not here material, were filed by defendant, pro se. On July 12, 1964, defendant, pro se, filed a petition for a writ of habeas corpus ad testificandum. The record does not reflect a ruling on any of defendant's petitions, but since no writ of habeas corpus was issued, we deem the petition to have been denied.

On July 23, 1964, the case was called for trial and plaintiff's attorney advised the Court of a conversation with the attorney with whom defendant had corresponded, the substance of their conversation being that the attorney had not been paid for his services and agreeing that the case could be reset for August 5, 1964. On August 5, 1964, plaintiff's attorney advised the Court that defendant had failed to pay the attorney fee which his prospective counsel had requested, and that he would not appear. The case was called for trial, and after calling the defendant three times in open court, the Court entered a default against defendant. Evidence was heard, and a decree annulling the marriage and restoring plaintiff's maiden name was rendered and entered.

Defendant filed a notice of appeal and this court allowed a motion to proceed in forma pauperis. Defendant has filed numerous motions and petitions, all of which have been denied.

No abstract has been filed and defendant has filed a typewritten brief. He assigns as error the Court's refusal to issue a writ of habeas corpus ad testificandum, thus depriving him of the opportunity to confront plaintiff and her witnesses, and that the evidence fails to establish ground for annulment.

Chapter 65, section 34, Ill. Rev. Stat. 1963, provides for the issuance of writs of habeas corpus, when necessary, to bring a prisoner before the court for the purpose of testifying. In the case of Van Vlissingen vs. Van Vlissingen, 173 Ill. App. 124, the Court, in reversing a decree of divorce, stated that while the disposition of a petition for habeas corpus for the purpose of enabling a prisoner to testify is within the discretion of the Court, in most cases he is entitled to the aid of the Court in obtaining his presence at a trial where he is a defendant. In The People vs. Adams, 4 Ill. 2nd 453, the Supreme Court held that the denial of a writ of habeas corpus ad testificandum was not error where it appeared from the evidence that no testimony by the defendant himself would affect the result. After a careful examination of the record before us, including the many petitions and motions filed both in the trial court and this court, we conclude that this is the rare instance in which defendant's presence would not have affected the result and will not say that the trial court abused its discretion in failing to issue the writ.

The testimony of plaintiff and her corroborating witnesses

is sufficient to support the trial court's findings that defendant fraudulently concealed from plaintiff the fact that he was guilty of a felony and under indictment therefor at the time of the purported marriage. Since conviction of a felony is ground for divorce, we hold that the wilful concealment of the pendency of the indictment and defendant's guilt, as evidenced by his plea of guilty, was such fraud as would entitle plaintiff to an annulment. The decree of the Circuit Court of Jackson County is therefore affirmed.

Decree affirmed.

Concur: Edward C. Eberspacher

Concur: George J. Moran

Publish Abstract only.

NO. 11881

58 I.A.2 134

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | |
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| IN THE MATTER OF THE ESTATE OF GEORGE F. PETERS, Deceased. | |
| FIRST NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, Administrator of the Estate of George F. Peters, deceased, Petitioner-Appellee, vs. ROBERT E. PETERS, VERNON L. PETERS and RAY W. PETERS, Respondents-Appellants. | Appeal from the Probate Court of Winnebago County. |

MORAN - J

This is an appeal from an order of the Probate Court of Winnebago County in accordance with Ill. Rev. Stat. ch. 3, Sec. 329 (1963). The order arose from a citation proceeding under Sections 183, 184 and 185 of the Probate Act and was entered on July 29, 1963.

The decedent, George F. Peters, prior to his death was a partner in a business known as "Peters Bros." The partnership included three of decedent's brothers, namely, Ray, Robert and Vernon Peters. On

July 17, 1952, the partners conveyed certain realty in trust to the Illinois National Bank and Trust Co. of Rockford as Trustee under Trust No. 1643. By the terms of the Trust Agreement, the legal and equitable title to the property was to be in the Trustee. The four brothers were each to have a one-fourth beneficial interest in the corpus of the Trust, with the further provision that "the interest of any person or any beneficiary hereunder shall consist solely of the power of direction over the title to said property and the right to receive the proceeds from sales or rentals of said property."

Approximately six years later, on April 8, 1958, the four brothers entered into a written partnership agreement. One of the provisions of the instrument required an annual valuation of the partnership assets so that in the event of the death of a partner, the surviving partners could determine the fair share to be paid to the deceased partner's representative. The document stated, "The partnership shall be deemed to have commenced on the first day of May, 1946." Paragraph 12 of this agreement provided:

> "(12) Any real estate owned by the partners is hereby made the separate property of the partners and toward that end, the partners have conveyed all Partnership real estate by deed in trust to The Illinois National Bank & Trust Co., subject to Trust Agreement with said Bank and all partners hereto agree to become and are hereby bound by the terms of such Deed in Trust and Trust Agreement."

On the same date, April 8, 1958, the brothers amended Trust No. 1643, by adding another parcel of real estate and the referred to partnership document.

Some months later, on July 23, 1958, the partners, together with another brother, Clifford Peters, caused an additional trust to be formed, the corpus being a 240 acre farm. The Illinois National Bank and Trust Co. of Rockford was named as Trustee under Trust No. 1787. This Trust Agreement contained the same provisions as Trust No. 1643, except that there were five brothers, each with a one-fifth beneficial interest.

On April 13, 1962, the four partners, including the decedent, executed two instruments. One set the valuation of all the personal property of the partnership, excluding realty, at $30,000.00; the second document set the valuation of all the realty in Trust No. 1643 at $20,000.00. This same day the four partners, along with Clifford Peters, who was not a partner nor bound by the partnership agreement, executed an instrument which set the value of the realty under Trust No. 1787 at $30,000.00. It appears that the market value of the real estate may be substantially in excess of the agreed valuation set forth in the instruments executed by the partners.

The record discloses that on July 16, 1962, George F. Peters expired this life, and on the petition of his widow, the First National Bank and Trust Company of Rockford was appointed administrator of his estate.

The administrator-appellee filed a petition for citation to discover assets, naming the three surviving partners as respondents. Neither the Trustee, Illinois National Bank and Trust Co. of Rockford nor Clifford Peters were made parties to the proceedings. A hearing was had on the citation and the cause was continued. Thereafter, the

administrator filed a petition to turn over assets. The prayer of this petition requested an order requiring the three surviving partners and Clifford Peters, upon whom service was not had, "to recognize the interests of the undersigned in and to the above described trusts and to turn over to it said interests." Written objections were filed. A hearing was had on the petition and objections.

On July 23, 1963, the Probate Court entered the order from which this appeal originates. The order read as follows:

> "Now, Therefore, It Is Ordered And Declared that First National Bank and Trust Company of Rockford, administrator of the estate of George F. Peters, deceased, be, and it hereby is, the owner of all right, title and interest in said trusts which George F. Peters had at the time of his death, and that said right, title and interest is not subject to or controlled by said partnership agreement."

The appellants claim that the Probate Court is without jurisdiction under Sections 183, 184 and 185 of the Probate Act to enter this order. It is urged that the trial court erred in exercising equitable powers when it interpreted the trust documents and the partnership agreement which were in conflict. The appellants claim that such power rests solely in a court of general jurisdiction with equitable powers.

It is to be noted that the prayer of the petition asks the Probate Court to recognize the interests of the administrator. It is further noted that the order did nothing more than interpret the instruments and made a declaration of rights concerning the same. Nowhere were the respondents found to be in possession of nor ordered to turn over to the

administrator any property. The order simply amounted to a declaration of rights or a declaratory judgment. This case arose prior to January 1, 1964, the effective date of the revised Judicial Article.

It has been settled that the jurisdiction of probate courts is limited to the subjects enumerated in Section 20 of Article VI of the Constitution. Rosen v Rosen 370 Ill. 173. This jurisdiction cannot be extended, even by the legislature, to other and different matters than those specified. First State Bank of Steger v Chicago Title and Trust Co., 302 Ill. 77. While it is true that a probate court has jurisdiction of an equitable character and may adopt the forms of equitable proceedings and grant relief of an equitable nature where justice and equity require such relief, (Bliss v Seaman, 165 Ill. 422; Chicago Title and Trust Co. v McGlew, 193 Ill. 457; Thomson v Black, 200 Ill. 465), still a probate court has no jurisdiction to determine the validity or construction of a prior revoked joint will as a contract not revoke, In re Estate of Baughman, 20 Ill. 2d 593; In re Will of Lortz, 23 Ill. 2d 344, nor to determine a petition of the administrator to set aside a conveyance by the decedent, Roffmann v Roffmann, 384 Ill. 315; Moser v Feciura, 324 Ill. App. 552.

The purpose of a citation proceeding under the Probate Act is to provide a summary method for the recovery of certain defined property which had come into the possession of a third party. Wilson v Prochnow, 359 Ill. 148. In the case of In re Estate of Miller, 311 Ill. App. 280, the administratrix filed a citation petition in the probate court of Bureau County alleging that one Amanda Adams had in her possession and control certain papers and evidence of title to land belonging to the Estate of David A. Miller. The probate court upon conclusion of its hearing ordered Amanda Adams, the respondent, to convey the property to the administratrix.

She refused and the conveyance was made by a special commissioner. Some seventeen months later when the administratrix petitioned the court to sell the land to pay debts, the same respondent attempted to intervene as an interested person but was denied the right to do so. On appeal, the reviewing court reversed the original order in the citation proceedings, stating:

> "The order was not authorized by the statute. The remedy provided by these statutory provisions is for the recovery of specific personal property, books of account, papers or instruments of title and the obtaining of information concerning any indebtedness, or evidences of indebtedness, or property, titles or effects belonging to any deceased person, or to the executor or administrator, or the estate of any deceased person and does not purport to confer upon probate courts general equity jurisdiction which general equity jurisdiction probate courts do not possess. In re Estate of Shanks, 282 Ill. App. 1; Dixon v Nefstead, 285 Ill. App. 463."

We have been unable to find any precedent for extending the limited equitable jurisdiction of the probate court to include a declaratory judgment action.

We are of the opinion that the Probate Court of Winnebago County at the time of the entry of the order was without jurisdiction. Having reached the conclusion, there is no need to pass upon the other assignments of error.

The judgment of the Probate Court is reversed and remanded with directions to dismiss the petition for want of jurisdiction.

REVERSED and REMANDED
WITH DIRECTIONS.

Abrahamson, P. J. and Carroll, J. concur

Abstract

4-19-65
V 58 #4

(202)

A

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

(58 I.A.2 202)

General No. 10572 Agenda No. 2

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| Dani Lee Mohan, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| James Thayer Mohan, | ) | Appeal from the |
| | ) | Circuit Court of |
| Defendant-Appellant. | ) | Sangamon County. |

PER CURIAM

The defendant appeals from the decree of the trial court awarding separate maintenance to the plaintiff and dismissing plaintiff's counter-claim for divorce. This decree also awarded the sum of $300.00 per month as support to the plaintiff and the further sums of $125.00 per month for each of two children of the parties.

Defendant-Appellant's Brief, in stating the nature of the case, sets forth the following:

> " Shortly after the conclusion of the trial, defendant made a determination not to appeal, and, so advising the Court, asked that no findings of fact be made in the Decree. The Court made only a general finding that the

> allegations of the Complaint were substantially true. Subsequent events brought a reversal of that determination and, upon filing the Notice of Appeal, the trial judge and Plaintiff's attorney were advised that, in consequence of the earlier request, no issue would be raised as to the sufficiency of the findings."

The testimony of the parties in this cause is highly conflicting. Upon review of the record, it appears that there is more corroboration of the testimony of the plaintiff in its several aspects, than there is corroboration of the defendant. We must approach this appeal under the principle stated in Johnson v Johnson, 125 Ill. 510 at p. 514:

> " In cases in chancery, when the evidence is conflicting, and the witnesses have been examined orally in court, it is said, in Coari v Olsen, 91 Ill. 277, that there is the same necessity existing as when there has been a trial by jury, that the error in the finding of fact shall be clear and palpable to authorize a reversal. The rule announced is a just one, when the evidence to which credit is given is sufficient to sustain the decree, for the very manifest reason that the chancellor had the witnesses before him, with an opportunity of observing them while testifying, and was thus afforded facilities, frequently of the greatest importance, in determining the weight and credibility of their evidence, which we, from the very nature of the hearing, on appeal, can not have."

As the core of the marital conflict between the parties, we find it admitted by defendant that for some years defendant has

been addicted to practices described by psychiatrists as a sexual deviation, i.e., an involuntary urge for stimulation by "bondage" which required that he be tied in one manner or another prior to having marital relations, and upon occasions, that the plaintiff likewise be tied in one way or another. Upon occasion, the "bondage" required that the defendant wear a tape mask and socks upon his hands in addition to being tied. It further appears that the defendant sought stimulation by having plaintiff cater to his "fetish" which called for the plaintiff to wear various garments, including boots, apparently custom built with very high heels, leotards, and an item of attire described as a waist cincher.

It seems to be admitted that plaintiff had knowledge of these characteristics of the defendant prior to the marriage, but the evidence is conflicting as to whether she participated in such practices prior to the date of the marriage, and there is no evidence that she had foreknowledge of the extent and degree of the defendant's practices. In so far as the record can be interpreted, the demands of the defendant with regard to the practice of "bondage" were enlarged in scope and nature during the years of the marriage, and such demands were extended to include indulgence of his wishes concerning his "fetish", and the manual stimulation of the defendant prior to normal relations.

There is corroboration of plaintiff's testimony that she became emotionally upset by the requirements of the defendant in their marital relations in the testimony of Thelma Scheid, mother of the plaintiff. Again, plaintiff consulted a psychiatrist, Dr. Cadwell, over a considerable period of time. The latter testified that he considered the plaintiff to be trustworthy in reporting her feelings upon the problem; that plaintiff told him she married the defendant thinking she might help him get over the problem; and that she consulted with the witness hoping that he could help the defendant get over the problem or help the plaintiff to learn to accept it.

It may be noted that the defendant also consulted Dr. Cadwell for a shorter period of time, but then abruptly cancelled all further appointments. Defendant does not testify that he ever actually sought treatment for his condition from Dr. Cadwell, and there is no testimony that he was being treated therefor. The doctor testified that this deviation would probably be of long duration and there is no psychiatric reason to believe that it would change. Plaintif testified, and Dr. Cadwell corroborates, that she indulged the practices of the defendant to ease the tension between herself and the defendant, and to go along with him with the hope of helping him. It appears that while she was never physically compelled to

participate, she did accept his persuasion that to refuse meant that she didn't love him and didn't think of his welfare.

There is evidence that the plaintiff had expressed her feelings and her revulsions at the practices of the defendant upon a number of occasions to the defendant, and that upon at least one occasion, defendant promised to cease them, but that, nevertheless, he resumed insistence upon the practices. Dr. Cadwell testified that the plaintiff had told him of the circumstances of the defendant's promise to cease the practice and that she then ceased her consultation with him. Defendant, in his testimony, complains that the plaintiff, upon occasion, had talked of seeking a divorce. Dr. Cadwell testified that during the period of consultation with him, plaintiff only talked of divorce when she felt that the conditions existing in the marriage would not improve.

There is evidence of certain bouts of violence between the parties occurring during the course of arguments, but the evidence is in conflict as to who provoked the blows, and the degree of provocation. The evidence does seem clear that upon such occasions, the defendant used his admitted strength without any restraint having regard to the physical capabilities of the parties, and that he did not hesitate to use great force where it might be said that he was retaliating for lesser blows.

The evidence discloses that it was actually the defendant who left the home of the parties, taking with him such substantial amounts of furniture and furnishings that it required the day to pack the same and necessitated the services of "movers". There is also evidence that prior to and at the time of defendant's moving away, he refused the request of the plaintiff that the parties make further efforts to save the marriage. Under this record, we do not believe that the matters testified to by the plaintiff as justification for his leaving the residence would necessarily persuade the trial court.

As to amounts awarded for the support of the plaintiff and of the two children of the parties, we note that the award is but slightly more than the amount discussed by plaintiff's counsel as a fair award at the close of all of the evidence in the case.

Upon a considerable review of the record presented, this court must conclude that the finding of the trial court, that plaintiff without fault on her part was living separate and apart from the defendant, is not contrary to the manifest weight of the evidence, and hence the decree of the trial court must be affirmed.

50135

(58 I.A.2 262)

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| PEOPLE OF THE STATE OF ILLINOIS, Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF |
| v. | ) | COOK COUNTY, ILLINOIS |
| COLLINS C. WALTON, Appellant. | ) | |

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered May 16, 1963, in the Circuit Court of Cook County, Criminal Division, after a bench trial finding the appellant guilty of the crime of burglary in that "he, without authority knowingly entered into a building, to-wit: warehouse of West Side Warehouse Co., a corporation, with the intent to commit therein a theft. . . ."

The theory of the appellant is first that an alleged statement given by him admitting the burglary was improperly admitted into evidence and second, that without this alleged admission the record is devoid of any evidence that he committed the crime.

During the latter part of the evening of February 5, 1963, someone broke into the West Side Warehouse at 2700 West Washington Boulevard in Chicago. An alarm installed on the premises was sounded and two policemen answered the call. Two men from the ADT company also responded to the alarm. All four entered the building and heard a noise on the roof, and two of them ran outside to see if anyone was there. It was the appellant who was on the roof, and he was taken into custody. There was testimony at the trial that on his arrest the appellant asked to be shot.

A broken window leading to the interior of the warehouse was discovered five feet from the place where the appellant was found. The warehouse contained bags of sugar, some of which were immediately below this window. One of the bags had been broken open as if someone had

fallen on it after jumping from the window above.

When the appellant was taken into custody, he was covered from the waist down with a white powdery substance. Some of this was taken from a pants cuff and was analyzed to be ordinary household sugar. This was the same type of sugar as was in the warehouse.

The People maintain that after he was brought to the police station, the appellant made a full confession to two police officers, but refused to sign it. The appellant said at the trial that he made a statement but did not at any time confess the crime. The appellant's credibility was impeached at the trial by the proof of two previous burglary convictions.

The People brought to the stand James Schloegel, one of the officers before whom the confession was supposed to have been made. He testified that the papers were not in the same condition as they were at the time the statement was made, for certain portions had been deleted. The deleted portions apparently contained inadmissible material, and no question of prejudice is raised concerning these deletions. Officer Schloegel testified that he did not have an independent recollection of all the questions asked of the appellant or of the answers he gave. He said that he did not ask the questions or write down the answers; that was done by another officer, Henry Stewart. Officer Stewart never testified at the trial.

The appellant claims that since the statement was unsigned, and since the witnesses called to the stand could not say from his own recollection that the papers before the Court truly set forth what occurred at the police station, that the Court below should not have admitted the confession into evidence.

In People v. Perkins, 17 Ill.2d 493, 162 N.E.2d 385 (1959), it was held that an unsigned confession was admissible where the police

officer testified that the written confession was a true and correct transcript of the questions asked and answers given. This matter, however, is markedly different from the Perkins case. Here, the police officer called upon to testify as to the authenticity of the confession could not remember what the questions asked and the answers given were. The People did nothing to rehabilitate the witness. It might be that had the officer been asked if by looking at the papers he could say whether or not they accurately set down the conversation of that evening, he would have said that he could. The question, however, was not asked, and we cannot assume the answer. We must hold that no proper groundwork for the admission of this purported confession was made, and that it was improper for the Court below to receive it into evidence.

We also hold, however, that the error was not prejudicial in that there was more than adequate evidence to find the appellant guilty of the charged offense beyond a reasonable doubt. He was found on the roof of the warehouse in the middle of the night. He was covered from the waist down with sugar. He said he was arrested while walking down the street, yet two unimpeached witnesses say they saw the appellant on the roof.

In view of the foregoing facts, we believe that this case falls within the rationale of People v. Saisi, 24 Ill.2d 274, 181 N.E.2d 68 (1962). There the Supreme Court held that no prejudicial error had been committed in a bench trial where the Court improperly admitted evidence. The Court held that in a trial before a judge sitting without a jury, the trial judge is presumed to have considered only competent evidence in reaching his decision.

In the case at bar, there was more than enough competent evidence to sustain the finding of guilty and the judgment entered thereon by the Court below. We hold, therefore, that under the

circumstances of this case, the admission of the confession was error, but was not prejudicial so as to warrant a reversal of the judgment entered below. The judgment is affirmed.

JUDGMENT AFFIRMED

BURKE, P.J., and LYONS, J., concur.

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| ELIZABETH MURRELL and HOLLAND MURRELL, Plaintiffs-Appellants, | ) | APPEAL FROM |
| v. | ) | SUPERIOR COURT |
| NATHAN WEITZMAN and HARRIS TRUST AND SAVINGS BANK, as Trustee under Trust No. 14336, Defendants-Appellees. | ) | COOK COUNTY |

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order denying plaintiffs' petition to vacate an order dismissing their amended complaint.

Plaintiffs filed their original complaint on April 10, 1962, for the cancellation of a deed of conveyance and a mortgage and for an accounting of rents and profits. On motion of defendants the complaint was stricken on the ground that the matters contained therein had been previously adjudicated by the Circuit Court of Cook County. Plaintiffs were given leave to file an amended complaint, which they filed on June 18, 1962.

The amended complaint alleged that, at all times thereinafter mentioned, plaintiffs were, and are, the owners in fee simple of the following described real estate, located in Chicago:

> Lot 5 in Block 1 in John J. Mitchell's South Park Subdivision of Blocks 9, 10 and 11 in Maher's Subdivision of the Southeast 1/4 of Section 15, Township 38 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

The amended complaint further alleged that on September 28, 1956, plaintiffs were indebted to defendant Weitzman on a second mortgage on the above-described premises; that plaintiffs executed a deed of conveyance of the premises to Chicago National Bank, Trustee under Land Trust No. 14336, defendant Weitzman being the sole beneficiary of said trust; that, although the deed purported to be an absolute conveyance on its face, it was not intended as such by the parties thereto; that also

on September 28, 1956, defendant Weitzman and plaintiff Elizabeth Murrell executed Articles of Agreement for Warranty Deed whereby defendant Weitzman agreed to reconvey the premises to said plaintiff subject to the terms contained therein; that defendant Weitzman wilfully and fraudulently neglected to include plaintiff Holland Murrell as a party vendee to the Articles of Agreement; that defendant Weitzman has failed and refused to give plaintiff a copy of the Articles of Agreement or to give her receipts for payments made by her pursuant to said Articles; that defendant Weitzman has taken possession of the premises and receives the rents and profits therefrom. The amended complaint further alleged that defendant Harris Trust and Savings Bank, hereinafter referred to as Harris Trust, is the successor trustee of Trust No. 14336; that on December 12, 1961, a mortgage was executed by Harris Trust at the direction of defendant Weitzman, creating a lien upon the premises; and that defendant Weitzman was not the owner of the premises and either fraudulently or negligently executed said mortgage. The amended complaint finally alleged plaintiffs discharged a certain first mortgage on the premises, the release of which is dated and recorded December 12, 1961. Plaintiffs prayed for the cancellation of the 1956 deed of conveyance and of the 1961 mortgage executed by Harris Trust at the direction of defendant Weitzman, and for such other relief as may be just.

Defendants again filed a motion to strike the amended complaint on August 30, 1962, on the same grounds as before, namely, that the matters contained therein had been previously adjudicated. Attached to the motion was a certified copy of the decree of the Circuit Court of Cook County, entered September 7, 1960, in the case of Holland Murrell and Elizabeth Murrell v. Nathan Weitzman and Chicago National Bank, a Banking Corporation, as Trustee under Trust No. 14336, Case No. 58 C 15592, hereinafter referred to as the 1960 suit and the 1960 decree. The 1960

suit was filed by plaintiffs for the cancellation of the 1956 deed of conveyance and the Articles of Agreement here involved, as well as for an injunction to prevent defendant Weitzman from prosecuting any action to recover possession of the real estate. Defendant Weitzman counterclaimed therein, praying that the court find that plaintiffs have no right, title or interest in the real estate and that an order be entered directing that plaintiffs surrender possession thereof to defendant Weitzman. The basis of defendant's counterclaim was the second mortgage indebtedness of plaintiffs to himself, the deed of conveyance of 1956 and the Articles of Agreement executed in settlement of an action brought to foreclose said second mortgage, the failure of plaintiffs to make payments pursuant to said Articles, and the election of the defendant to terminate the agreement and demand possession of the real estate. The issues were found in favor of defendant Weitzman and against plaintiffs. The 1960 decree recited that plaintiffs' complaint was dismissed for want of equity, that plaintiffs have no right, title or interest in the real estate, and that defendant Weitzman is entitled to, and should have, possession of the said real estate.

Plaintiffs filed no responsive pleading to the motion to strike, and on October 30, 1963, ten months after the motion to strike was filed, plaintiffs' amended complaint was dismissed.

On November 29, 1963, plaintiffs filed their petition to vacate the order of October 30, 1963 dismissing the complaint. The petition alleged, inter alia, that no responsive pleadings were filed to defendants' motion to strike and that, if given an opportunity to so plead, plaintiffs have a good and meritorious defense to the allegations contained in the motion to strike; the petition did not set out what that defense was. The petition to vacate was denied, from which denial plaintiffs bring this appeal.

Plaintiffs maintain that the trial court was in error in dismissing the amended complaint on grounds of res judicata since the amended complaint raised matters not covered in the 1960 suit, and that the trial court abused its discretion in denying their petition to vacate the dismissal order.

Plaintiffs' first contention, that the amended complaint raised matters not involved in the 1960 suit, is based on the allegations in the amended complaint that plaintiffs discharged the first mortgage on the premises, the release thereof being dated and recorded subsequent to the entry of the 1960 decree, and that plaintiffs, not defendant Weitzman, are the fee simple owners of the real estate and were such at the time Harris Trust executed the 1961 mortgage at the direction of defendant Weitzman, the execution occurring subsequent to the 1960 decree.

The amended complaint contains no statement as to how plaintiffs came into title to the real estate after the entry of the 1960 decree which confirmed title thereto in defendant Weitzman. The allegations, that plaintiffs were then and are now the owners of the real estate, and that defendant Weitzman was not and is not the owner, are mere conclusions of the pleader, and further are contradicted by the 1960 decree. Plaintiffs did not allege sufficient facts showing that they have such an interest in the real estate as to give them standing to challenge the execution of the 1961 mortgage by Harris Trust. This is especially true in view of the allegation in the amended complaint that plaintiffs executed a deed of conveyance to defendant Weitzman as beneficiary under Trust No. 14336 prior to the filing of the amended complaint.

The amended complaint further fails to state when the first mortgage on the real estate was discharged by plaintiffs, whether before or after the 1960 decree. Nor is there any prayer in the amended complaint relating to an accounting for the alleged payment made to

discharge said first mortgage; in fact, plaintiffs' brief states that "this suit was filed by plaintiffs to have a deed and a mortgage declared void; and for an accounting of the rents and profits."

Although the order dismissing the amended complaint states the court heard testimony on the motion to strike and that all parties were represented by counsel, the record does not show plaintiffs as much as offered to correct these substantial omissions in their pleading. Further, since these matters are not well pleaded, they are not admitted by defendants' motion to strike. No cause of action is stated in the amended complaint as to either of these two alleged new matters, and the balance of the matters contained in the amended complaint are clearly and directly barred by the 1960 decree. We therefore cannot say that the trial court erred in dismissing the amended complaint on the grounds of res judicata.

As to plaintiffs' contention that the trial court abused its discretion in denying the petition to vacate, it should be noted at the outset that plaintiffs had ten months within which to file a responsive pleading to the motion to strike, yet failed to do so. This fact is even admitted in the petition to vacate. It does not appear from the record that plaintiffs as much as offered to answer the allegations in the motion to strike at the hearing thereon.

The only matter alleged in the petition to vacate by way of defense to the motion to strike, is that "plaintiffs have a good and meritorious defense to the allegations contained in the motion to strike and have retained new counsel to present same." This allegation merely states a conclusion of the pleader. Nowhere in the record does it appear that the trial court was apprised of what this defense was or why it had not been seasonably presented. In view of the foregoing and in view of the fact that it clearly appeared from the amended complaint that the

matters contained therein were either not well pleaded or were barred by the 1960 decree, the trial judge did not abuse his discretion in dismissing plaintiffs' petition to vacate. Failure of plaintiffs' counsel to file responsive pleadings to the motion to strike does not constitute grounds for a vacation of the dismissal order under these circumstances. See Wilkins v. Crook, 342 Ill. App. 205.

Subsequent to the filing of this appeal, defendant Harris Trust filed a motion in this court to correct the caption under which this action had theretofore proceeded. It appears that Harris Trust was named a party defendant and a party appellee in its individual corporate capacity, rather than in its capacity as Trustee under Trust No. 14336. Affidavits of counsel were filed with the motion which state that counsel were not retained by Harris Trust at trial or on appeal to represent Harris Trust in its individual corporate capacity. A reading of the record clearly indicates that Harris Trust was proceeded against in this action solely as trustee under Trust No. 14336, and in no other capacity. This is apparent from the amended complaint which describes Harris Trust as successor trustee under Trust No. 14336, and, in the following paragraph, states that it executed the 1961 mortgage at the direction of defendant Weitzman.

This court has the power to amend the record by correcting errors. Ill. Rev. Stat. 1963, Chap. 110, Pars. 92(1), 101.50 (S.Ct. Rule 50) and Article VI, Sec. 7, Ill. Constitution. Since plaintiffs are in no way harmed by allowing defendant Harris Trust's motion in this regard, the record of this case is corrected to show that Harris Trust and Savings Bank is a party defendant and a party appellee as Trustee under Trust No. 14336, and not in its individual corporate capacity. Also in accordance with the motion, the order entered by this court on July 28, 1964, granting Lissner, Rothenberg, Reif and Barth leave to

enter its appearance as additional counsel for Harris Trust and Savings Bank, a corporation, is vacated, and leave is granted to Lissner, Rothenberg, Reif and Barth to enter its appearance as attorneys for Harris Trust and Savings Bank, as Trustee under Trust No. 14336.

The order is affirmed.

ORDER AFFIRMED.

BRYANT, J., and LYONS, J., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January, in the year of our Lord one thousand nine hundred and sixty-five, within and for the Third District of Illinois:

Present - Honorable Jay J. Alloy, Presiding Justice
Honorable John R. Coryn, Justice
Honorable Allan L. Stouder, Justice
J. Lindo Silver, Clerk
James A. Callahan, Sherrif

BE IT REMEMBERED, that afterwards on MAY 13 1965 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Case No. 64-70

In The Abstract

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

| | | |
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| ROBERT T. FIELDING, Plaintiff-Appellant, vs. MARGARET F. FIELDING, Defendant-Appellee. | ) | Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois. Honorable John L. Poole, Judge Presiding. |

ALLOY, P. J.

Modified Opinion on Rehearing.

In this cause before us on an appeal by Robert T. Fielding, Appellee Margaret F. Fielding has filed a motion to dismiss the appeal; to strike the report of proceedings filed in the Appellate Court; to strike the record on appeal filed in the Appellate Court;and to strike the abstract of record and statement, brief and argument filed by the Appellant in this Court, on the ground that in each and all cases the filing of such documents was not within the time prescribed by rules or within any order extending the time for filing of said documents. Petition for rehearing was filed herein and we have determined to modify the opinion upon rehearing. In view of the fact that the conclusion of this Court is not changed but only its reasons assigned are modified, it was deemed unnecessary to require an answer to the petition for rehearing.

It is apparent from the record that the notice of appeal was filed in the Circuit Court of Whiteside County on the 17th day of July, 1964. An

It is clear that under the Uniform Appellate Court Rules, Chapter 110, Section 201.9(2), the abstract and brief of Appellant was required to be filed on or before 30 days from the date of filing of the record on appeal. No request, however, was made to this Court for an extension of time to file abstract and brief, and, in fact, no effort was made to do anything specific about the late filing of the report of proceedings or the record on appeal or the abstract and brief of Appellant until after the filing of the motion to dismiss the appeal in this Court in December of 1964.

If we were confronted only with the question relating to the report of proceedings and the failure of the trial court to enter the order under the facts and circumstances presented in the case which indicates that the trial court inadvertently overlooked the entry of the order, we would be inclined to deny the motion to dismiss the appeal. The fact, however, that there was a specific failure to file the abstract and brief of Appellant until more than 30 days after the filing of the record on appeal at a time when Appellant had knowledge that no order had been entered extending the time for filing the report of proceedings (and, incidentally, record on appeal) indicates that there was no compliance with the rules relating to filing of documents on appeal in this court. Many avenues are open to counsel to obtain extensions of time for the filing of required documents on appeal within the time specified in the rules.

As indicated in HAMBLEY vs. CONROY, 11 Ill. App. 2d 568, the rules relating to time for filing documents on appeal must either be applied or abolished. We feel that if the rule is not applied to a case such as is now before us, then it is pointless to justify the application of the rule in most cases. The rules relating to appellate procedure prescribe the time within which certain acts are to be performed. Adherence to such rules cannot be made selective. While we would have been inclined to permit the entry of an

order nunc pro tunc with respect to the filing of the report of proceedings on the basis of the affidavits as submitted, we cannot excuse the late filing of the abstract and brief under the circumstances before us and accordingly feel that the motion to dismiss the appeal should be granted. The motion to dismiss the appeal will, therefore, be granted and the appeal is accordingly dismissed.

Appeal dismissed.

Stouder, J. and Coryn, J. concur.